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In The

Supreme Court of the United States

October Term, 1972

Docket No. 72-1175

LUIGI LOBUE,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court Southern District of New York

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1972

No. ____

LUIGI LO BUE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioner prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit.

Opinion Below

The affirmance in the Court of Appeals which was rendered without any opinion, is set forth in Appendix A to this petition. The opinion rendered by the United States District Court for the Southern District of New York is set forth in Appendix B to this petition.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 29, 1972. That judgment affirmed the order of the District Court for the Southern District of New York, entered on March 20, 1972, which dismissed petitioner's application for post-conviction relief under Title 28 U.S.C., §2255.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court was based on 28 U.S.C., §2255.

Question Presented

1. Where petitioner's first motion under 18 U.S.C., §2255 was not determined on the merits by Judge Frankel in 1969, but was permitted to be withdrawn by such District Judge after a round of direct correspondence with the unrepresented petitioner who was then a mental patient in a federal prison hospital, was petitioner's renewed application in 1972 requesting similar relief properly dismissed as a "second or successive" motion under 28 U.S.C., §2255 by a different judge to whom petitioner's new application was erroneously referred?

Statement of the Case

A. Petitioner's 1962 Narcotics Conviction

Petitioner is an Italian national without literacy in the English language. In 1960 he was sentenced to a term of three years imprisonment for harboring aliens. While serving that sentence, petitioner, and nine others, were indicted in the District Court for the Southern District of New York upon a charge of Conspiracy to violate federal narcotics laws. Petitioner was convicted on this charge and, on February 13, 1962, he received a sentence of 15 years imprisonment to be served concurrently with the then still uncompleted three year sentence for harboring aliens. Petitioner's narcotics conviction was affirmed (sub. nom. United States v. Agueci [2 Cir. 1962], 310 F.2d 817, cert. denied 372 U.S. 959).

B. Petitioner's Mental Illness

During the course of his incarceration at the Lewisburg Federal Penitentiary, under his 1962 narcotics conviction, petitioner manifested serious indications of mental disorder. In November, 1965, he was hospitalized at Lewisburg and was diagnosed as psychotic with a paranoid personality. His mental condition was viewed as so acute that, on May 23, 1966, petitioner was transferred from the United States Penitentiary Hospital at Lewisburg to the Federal medical facility located at Springfield, Missouri. At the latter institution, he came under a constant regime of chemotherapy for paranoid schizophrenia. He was discharged from Springfield on June 1, 1970, into a parole

status which does not expire until August 24, 1976. Upon his discharge from the Springfield hospital, petitioner's "final diagnosis" was described as "schizophrenic reaction, paranoid type, improved."

C. Petitioner's 1968 Application for Relief Under 28 U.S.C., §2255

On September 28, 1968, petitioner filed an application in the United States District Court for the Southern District of New York alleging that he had been mentally incompetent throughout his federal narcotics trial in 1961 (Appendix C; 68 Civ. 3839). These hand-drawn papers, obviously prepared by another inmate at the Springfield Hospital where petitioner was lodged as a mental patient, were signed and sworn to by petitioner. In his papers, petitioner urged that his mental illness pre-dated his conviction, rendered him incompetent to have stood trial; and he requested a hearing under 28 U.S.C., §2255, at which hearing he expected to elicit testimony from two psychiatrists, whom he specifically identified (Appendix C). Petitioner further stated that "after consulting counsel" he would have "a number of other witnesses to present testimony at said hearing" (id., emphasis added). By way of particularizing his claims, petitioner stated that "he suffered such a severe psychosis that he had severe delusions and hallucinations and 'heard voices' at times prior to trial, and during said trial, and has suffered same until this past year" (id.).

Petitioner's home-drawn application for a hearing was referred to Judge Frankel (successor to

the deceased Judge Herlands who had presided at petitioner's narcotics trial). Judge Frankel entered a "memorandum" (Appendix D) observing that petitioner's papers, failing to particularize the precise testimony that his witnesses were to give on the issue of insanity at the time of the trial itself, "seem[ed] insufficient" (id.). Judge Frankel specifically declined, however, to deny petitioner's motion "on what would amount to a kind of pleading deficiency" (id.). Instead, Judge Frankel directed that both petitioner and the Government submit to the Court, in writing, information regarding certain itemized specifics. Among the items of interest to the Court were the following:

1. Who would represent petitioner at a hearing?

2. Should petitioner be given counsel to assist him? Was he indigent?

3. If counsel were to "enter the picture," then the Court expected a presentation "in pertinent detail" of what petitioner hoped to prove and exactly who would testify.

Petitioner, lodged at some considerable distance from the Court, illiterate, mentally ill, and without the aid of counsel, gave no reply to the questions posed in Judge Frankel's memorandum.[1] Apparently distressed by petitioner's

1. It is significant that petitioner heard no word from the court for more than one year after the date of the filing of his petition. Petitioner's application was filed on September 26, 1968. Judge Frankel's memorandum was filed October 28, 1969.

silence, the Court, on December 1, 1969, directed a further inquiry to petitioner. Petitioner, through the apparent assistance of another prisoner who could write (but not spell) English, replied to Judge Frankel (Appendix E):

> "Honorable Judge Frankel
>
> Dear Sir.
>
> In regards to your letter of December 1, 1969. . . . Your honorable Sir, At this time I wish to inform the Honorable Court of District of N.Y. . . . that I wish to at this time with draw my Motion. Sir, at this time I don't have anything to add to what I already have submitted to the Honorable Court. So Your Honor I would like to have the Court except [sic] this letter as a Plea to discontinue.
>
> * * *
>
> Respectively [sic]
>
> s/ Luigi LoBue
> 16236"

D. Judge Frankel's Disposition of the LoBue Petition

On December 10, 1969, after having received petitioner's letter reply, Judge Frankel endorsed a memorandum decision stating (Appendix F):

"[T]he petitioner by letter dated December 8, 1969, states that he wishes to withdraw his application. All things considered, it is concluded that he should be permitted to do so. Accordingly, upon the petitioner's application, his petition is dismissed.

So ordered."

E. Petitioner's 1972 Petition for §2255 Relief

Following his release, on probation, from the Springfield Medical Center in June 1970, petitioner returned to New York and gained employment. He thereafter retained counsel who, at his behest, drew a new set of papers seeking relief under 28 U.S.C., §2255 based upon petitioner's claim that he was insane at the time of his 1961 narcotics trial (Appendix G). Appellant's new petition was based not only upon his own highly particularized assertions of mental aberration, but upon a large selection of medical extracts drawn from his hospital records while in federal custody. Those extracts recited the same delusions which petitioner claimed had dogged him throughout his trial. In brief, petitioner claimed that he had suffered a serious trauma as a cavalryman during a bombing raid in Greece in World War II. A nearly direct hit had killed his mount and buried both petitioner and the horse. At his trial, he allegedly believed that the presiding Judge was a Greek priest blaming him for the death of his horse. Part of his bizarre ideation also involved a claimed belief that the dead animal was entombed in Judge Herland's lectern and bench.

Petitioner's papers were filed without any

knowledge on the part of his new counsel that petitioner had filed the similar petition in 1968 which had been referred to Judge Frankel. That 1968 petition bore an index number in no way related to petitioner's criminal case and petitioner, still claiming to be insane to his new counsel, made no disclosure in regard to the earlier petition and its withdrawal.

F. The Referral of the 1972 Petition to Judge Wyatt; Dismissal of the 1972 Petition

In Appendix B, the decision of Judge Wyatt denying petitioner's 1972 motion for §2255 relief is set forth. Apart from the Court's repeated irking references to petitioner as "Luigi," Judge Wyatt's decision purports to recount the disposition made by Judge Frankel in 1969 as a meritorious dismissal, and observes that petitioner's 1972 application is:

> "dismissed because it is the 'second or successive motion' for relief similar to that considered previously by [Judge Frankel] in 68 Civ. 3839. . . ."

Reasons for Granting the Writ

A. Petitioner's 1972 Application Was Not the Second or Successive Motion for Relief Similar to That Sought in 68 Civ. 3839. The 1968 Motion Was Dismissed "Upon the Petitioner's Application" Without an Evidentiary Hearing. It Was Not Denied on the Merits and Could Not Stand in the Way of Petitioner's New Application. (Sanders v. United States, 373 U.S. 1).

1. The previous 1968 motion was not denied.

Judge Frankel's decision in 68 Civ. 3839 was not, and did not purport to be, a denial of petitioner's motion on the merits. It was a pro forma dismissal simply permitting petitioner to withdraw his application. A memorandum written during the pendency of the matter clearly shows the Court's reluctance, and refusal, to deny the motion without a hearing (Appendix D). Accordingly, Judge Frankel filed an intermediate decision or memorandum directing petitioner to give response to certain questions. Petitioner, then an illiterate hospitalized mental patient, acting pro se, weakly responded through another prisoner that he had nothing to add to his papers "at this time" and requested leave to withdraw his application (emphasis added; Appendix E). In this utterly indecisive and troubling posture, petitioner's application for relief was allowed to be withdrawn.[2]

During his consideration of the pro se motion, Judge Frankel apparently had in mind the strictures of Sanders v. United States (1963), 373 U.S. 1.

In discussing Sanders' first petition, Associate Justice Brennan states (373 U.S. 1, 19):

> "Petitioner's first motion under Section 2255 was denied because it stated only bald legal conclusions with no supporting factual alle-

2. A serious question arises as to whether petitioner's status as a mental patient did not call for an immediate appointment of counsel to deal with the issues troubling the court. [See Sanders v. United States, (1963) 373 U.S. 1, 21.]

gations. The court had the power to deny the motion on this ground although the better course might have been to direct petitioner to amend his motion. But the denial, thus based, was not on the merits. It was a mere ruling that petitioner's pleading was deficient."

The guidelines laid out in Sanders were scrupulously followed by Judge Frankel in 68 Civ. 3839. Despite the arguable inadequacy of the papers, Judge Frankel did not deny the motion. Instead, the interim memorandum above referred to was prepared directing amendment. Judge Frankel's memorandum states (Appendix D):

> "As they stand, therefore, the motion papers seem insufficient, and the court might be disposed in the absence of other considerations, simply to deny the motion. But there are other questions. And there would, in any event be some doubt about the propriety of such a denial on what would amount to a kind of pleading deficiency." (Emphasis supplied.)

The memorandum goes on to inquire if petitioner was indigent and wanted assigned counsel. It also directed the petitioner, if represented by counsel, to show "more concretely and in pertinent detail, what the petitioner would propose to prove (and through whom) if an evidentiary hearing were ordered" (Appendix D).

Instead of following these directions, petitioner requested leave to withdraw his motion (Appendix

E). The Court "concluded that he should be permitted to do so" (Appendix F). Dismissal pursuant to this conclusion is certainly not a denial of the motion. It might have been better if the Court specifically stated "dismissed without prejudice to petitioner's right to renew," but the context makes this implication clear and Sanders, supra, makes this kind of statement unnecessary. 68 Civ. 3839 was aborted. It had no legal existence and no impact on subsequent motions.

2. There was no determination on the merits.

Even if petitioner's first motion had been 'denied,' a hearing on the second motion was required. The case falls squarely within Sanders, supra, which lays out the guidelines at 373 U.S., 15:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or Section 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the appellant on the prior application, (2) The prior determination was on the merits and (3) the ends of justice would not be served by reaching the merits of the subsequent application." (Emphasis added.)

The merits of petitioner's assertion of incompetency were never reached in his first motion, or at trial, and deserve something more than the peremptory treatment thus far received. Indeed, the District Court decision flies in the face of Sanders and the body of law cited therein. In these

circumstances, petitioner is clearly entitled to a grant of certiorari, or a summary direction to the District Court instructing that the hearing to which he is entitled be given to him without further delay.

B. Where petitioner set forth detailed and specific assertions that he was mentally incompetent to stand trial, a motion to overturn a conviction pursuant to 28 U.S.C. 2255 may not be denied without an evidentiary hearing.

1. The Statute.

Title 28, Section 2255 of the U.S. Code requires a "prompt hearing" for a collateral attack upon a sentence or judgment "[u]nless the motion and the files and records of the case show conclusively that the prisoner is entitled to no relief. . . ." The mandate could not be stated with greater clarity.

Nor can there by any serious doubt that the statute permits petitioner to raise the issue of mental competence to stand trial. In Simmons v. United States, (8 Cir. 1958), 253 F.2d 909, 912, this Court held:

> "It appears to be now well established that mental incompetency of a convicted defendant at the time of his trial and sentence can be raised by a 2255 motion in instances where the issue of sanity at the time of trial had not been raised and determined by the trial court at the trial. Bishop v. United States, 96 U.S. App. D.C. 117, 223 F.2d 582, vacated and remanded for a rehearing 350 U.S. 961."

Petitioner must, of course, show more than the bald assertion of mental incompetence (United States v. Molino [D.C.S.D. N.Y. 1965] 240 F.S. 332). He must make detailed and specific assertions of what he expects to prove (Machibroda v. United States, [1962] 368 U.S. 487, 494).

The law was recently summarized in United States v. Miranda, (2 Cir. 1971), 437 F.2d 1255, at 1258:

> "The general consensus of the courts which have heretofore considered the issue, therefore, seems to be where no evidentiary facts are alleged to support a bald allegation of mental incompetence, a hearing may not be required. (Citation omitted.) On the other hand, where the movant has raised detailed and controverted issues of fact, a hearing will be required." (Emphasis added.)

The statute (§2255) permits the District Court to deny a motion without an evidentiary hearing only where "the files and records of the case show conclusively" that the petitioner is not entitled to the relief he seeks. The District Court did not even hint at a jot or tittle in the record in this regard.

The District Court opinion did report that, in camera, and unbeknownst to petitioner, probation records were reviewed. These, however, are not the "files and records of the case" required by 28 U.S.C., §2255. See United States v. Collier (5 Cir. 1968), 399 F.2d 705. In Collier the Court tersely stated the rule to be applied in matters of this sort (at p. 707):

> "It is equally well settled that the record of the criminal proceeding itself must demonstrate conclusively that a defendant was competent to stand trial if a claim of incompetency is to be disposed of without a hearing." (Emphasis added.)

Documents or other evidence de hors the record may not be used to resolve the issue except at a hearing. Ex parte documents or reports will not suffice. Van De Bogart v. United States, 305 F.2d 583 (5th Cir. 1962); Taylor v. United States, 282 F.2d 16 (8th Cir. 1960). (Emphasis supplied.)

2. The petition.

Among the proofs offered in the petition is copious psychiatric data prepared by government psychiatrists at the United States Prison in Lewisburg, Pennsylvania and the United States Medical Center, Springfield, Missouri. They show that petitioner was mentally unbalanced during his incarceration (Appendix G).

The first of these reports post-dates the sentence by 3 years. In Nelms v. United States (4 Cir., 1963), 318 F.2d 150 the court held (at p. 154):

> "Admittedly, the assertion of insanity for the first time three years after conviction is not persuasive, but, while improbable, we cannot say, in the present posture of the case that it is impossible or incredible. Ordinarily, the question of mental competency to stand trial is not one which comes within the excusatory provision of 28

U.S.C.A., Section 2255, making unnecessary a hearing where the motion and the files and records in the case conclusively show that the prisoner is entitled to relief."

This view is reasonable. Problems of the kind observed by prison officials do not spring into existence fully formed like Athena from the head of Zeus. Psychiatric theory is far from unanimous. The mind of man resists plumbing the murky depth of psychosis. But, on one point, all agree. The kind of aberration that was seen in 1965 had its inception much earlier in the petitioner's life. The petition points to its origin in World War II and the exhibits to the petition - dating back several years - verify the allegations.

Put another way, one would expect that a person suffering from the delusions alleged by petitioner during trial would manifest some symptoms at a later date. This is not to argue post hoc ergo propter hoc, but those government psychiatric records do lend plausibility and substance to the likelihood that petitioner did not fully and continually comprehend the nature of his trial (Brown v. United States, (5 Cir. 1959) 267 F.2d 42).

In this case, petitioner alleged that he hallucinated repeatedly at his trial. A traumatic experience occurring during the Fascist expedition to Greece kept coming back to haunt him. He was a cavalryman and his mount had been killed in an air raid. For a period of time he and the dead horse were entombed by debris. He claims that during his conspiracy trial he was being called to judgment for his guilt in relation to the horse's

death. He likewise believed that "the Court's lectern and bench contained a dead horse" and that the presiding judge was a "Greek priest" (Appendix G). His hospital records at Springfield verify the hallucinations.

It is beyond argument that proof of this condition would vitiate the trial, sentence, and judgment. Though the claim is bizarre, an evidentiary hearing must be held: "This language [Section 2255] leaves no room for the District Court to simply disbelieve the factual allegations of §2255 petition in the absence of evidence in the record refuting them" Drake v. United States, (6 Cir. 1971) 439 F.2d 1319, 1320.

A hearing should have been held to determine if the alleged incompetency did, in fact, nullify petitioner's sentence and trial.

Conclusion

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Order of Affirmance

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of November one thousand nine hundred and seventy-two.

Present: HON. HENRY J. FRIENDLY
Chief Judge

HON. STERRY R. WATERMAN

HON. PAUL R. HAYS

Circuit Judges,

- - - - - - - - - - - - - - - - - -

Luigi Lobue,

Plaintiff-Appellant,

v.

United States of America,

Defendant-Appellee.

- - - - - - - - - - - - - - - - - -

Order of Affirmance

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

by: VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX B
Decision
(Filed March 20, 1972)

LUIGI LOBUE,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

72 Civ. 603

This is a motion by Luigi Lobue (Luigi) to vacate a sentence imposed on February 13, 1962 by the late Judge Herlands (28 U.S.C. §2255). Luigi is not proceeding in forma pauperis (28 U.S.C. §1915(a)) and apparently has retained counsel.

The motion is without merit and must be denied.

Luigi, an Italian national, has an extensive history of criminal activities stretching from his native Italy to this District. Of immediate interest are his two convictions before this Court. On February 29, 1960, Luigi was sentenced by Judge Herlands to three years imprisonment after conviction upon his plea of guilty to the charge of harboring aliens illegally within the United States (Cr. 168-177). While serving this sentence, Luigi was convicted after jury trial before Judge Herlands of conspiracy to violate the narcotics laws (the "narcotics conviction") and was sentenced on February 13, 1962 to 15 years imprisonment to run concurrently with the sentence for harboring

aliens (61 Cr. 527) (310 F.2d 817). It is this narcotics conviction and sentence that Luigi attacks by this motion.

A.

Luigi was released from prison on May 28, 1970, but remains subject to the jurisdiction of the Board of Parole until August 24, 1976. In addition, he is subject to proceedings by the United States Immigration and Naturalization Service for deportation to Italy and has posted a bond to secure his release pending the determination of his immigration status. Although Luigi no longer is "in custody under sentence" (28 U.S.C. §2255), the Court does not lack jurisdiction and the case is not moot; this is because of the adverse collateral consequences of the narcotics conviction. Cf. Carafas v. LaVallee, 391 U.S. 234 (1968); Holloway v. United States, 393 Fed. 731, 732 (2d Cir. 1968). It may be that the better practice would have been to file a writ of error coram nobis. See United States v. Morgan, 346 U.S. 502 (1954).

B.

Luigi's narcotics conviction (61 Civ. 527) was affirmed (United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), cert. denied under another name, Guippone v. United States, 372 U.S. 959 (1963)).

The present motion is the fourth collateral attack in this Court by Luigi on his narcotics

conviction.

The first motion under 28 U.S.C. §2255 (67 Civ. 2668) alleged the deprivation of the right to a fair trial because the Court failed to have read to the jury during its deliberations a portion of the testimony of a witness. The motion was assigned to Judge Weinfeld because of the illness of Judge Herlands, it was denied on September 27, 1967. On October 19, 1967, Judge Weinfeld denied an application for leave to appeal in forma pauperis. The Court of Appeals denied a similar motion on July 16, 1968.

The second motion under 28 U.S.C. §2255 (68 Civ. 3839) was predicated on Luigi's alleged mental incompetence at the time of trial and sentence. This motion was assigned to Judge Frankel because Judge Herlands had died. Judge Frankel was also assigned two other motions submitted by Luigi apparently in support of his Section 2255 motion; one was styled as a "Motion for Judgement [sic] on the Pleadings. . ." and the other was styled as a "Motion for Declaratory Judgement [sic]." In a memorandum filed October 28, 1969, Judge Frankel expressed a disposition to deny the Section 2255 motion without the evidentiary hearing requested by Luigi. But, exercising a degree of caution, Judge Frankel propounded several questions to Luigi and to the government, the answers to which were due by November 17, 1969. Thereafter, Judge Frankel extended to November 24, 1969 the time within which Luigi and the government might respond to the questions set out in the October 28 memo-

randum. The government submitted its answers by supplementary affidavit filed on November 28, 1969; the reason for the government's delay is not apparent from the files of the Court. On December 1, 1969, by letter to Luigi, Judge Frankel noted that no response had been received from Luigi and directed that Luigi "send a response or an explanation of why none is possible." By letter to Judge Frankel dated December 8, 1969, Luigi: (1) acknowledged Judge Frankel's letter of December 1; (2) stated that he did not "have anything to add to what I already have submitted to the" Court; and (3) made application to withdraw his Section 2255 motion. Judge Frankel, by an endorsement filed December 10, 1969, "dismissed" the "petition".

The third motion under 28 U.S.C. §225 (70 Civ. 2363) was an attack by Luigi on the narcotics conviction on the ground that a witness at his narcotics trial in 1961 allegedly recanted his testimony concerning Luigi before an Italian tribunal sitting in the United States in June of 1967. The 1970 motion came before Judge Weinfeld and was dismissed as "utterly without merit" by an endorsement filed October 6, 1970.

The present and fourth motion (72 Civ. 603) to vacate and set aside the narcotics conviction is grounded upon Luigi's "mental incompetence or insanity at all times relating to the commission of the crime charged" under indictment 61 Cr. 527, "as well as prior to, during, and after the trial relating thereto." Petition, at 2, §6.

Decision

This motion was assigned to me on March 8, 1972, apparently because the motion papers failed to disclose "whether or not applications previously have been made for writs or for similar relief, stating to what court or judge they were made, the determination in each case, and any new facts upon the present application that were not previously shown" in violation of the requirements of General Rule 26 (a) of this Court. Had such disclosure been made, the motion presumably would have been assigned to Judge Frankel who had decided the earlier similar motion.

The present motion is made by a "Petition" filed on February 9, 1972. The government was advised that it need not file answering papers.

C.

It is entirely clear that this fourth motion ought to be denied because it is the "second or successive motion for similar relief on behalf of" Luigi (28 U.S.C. §2255). This motion is the same as that decided by Judge Frankel in 1969 (68 Civ. 3869). Luigi does set out in his motion papers matter concerning psychiatric treatment received during commitment. The substance of this information was provided Judge Frankel by the government in a supplementary affidavit filed in answer to the questions directed to Luigi and the government in Judge Frankel's memorandum of October 28, 1969. After considering the motion and the government's answers, but without a reply to the questions by Luigi, Judge Frankel dismissed

the motion upon the application of Luigi. During Judge Frankel's patient consideration of Luigi's motion (68 Civ. 3869), every opportunity was given to Luigi to develop facts sufficient to warrant Section 2255 relief. Moreover, at the time Luigi filed his third motion for Section 2255 relief (70 Civ. 2363), Luigi completed a form provided by the Court in which all the alleged grounds for relief were to be stated. Luigi apparently was represented by retained counsel for the third Section 2255 motion. Neither Luigi nor his attorneys raised the question of mental incompetency.

It may be added that a review of the extensive files of the probation office and of the papers in this case and in the case before Judge Frankel discloses no suggestion that Luigi was incompetent in 1961 when he was tried. This motion is dismissed because it is the "second or successive motion" for relief similar to that considered previously by the Court in 68 Civ. 3839 (28 U.S.C. §2255).

The motion is denied.

SO ORDERED.

Dated: March 20, 1972

INZER B. WYATT
United States District Judge

APPENDIX C

Motion to Vacate Sentence and Judgment (Filed September 26, 1968)

In The United States District Court
For The Southern District of
New York, at New York

Civil Action No.
68 Civil 3839

(Same Title)

Motion to Vacate Sentence and Judgment:
U.S.C. 28, Section 2255

Jurisdiction

Petitioner seeks in the herein motion to set aside and vacate sentence and judgment of conviction in the below described case, on grounds alleged herein that he was mentally incompetent, at all times during said trial, to assist in his defense. And further that he was deprived of "Due Process of Law", due to said mental incompetency during trial, of which deprived petitioner of a rational and factual understanding of the charges against him, thereby depriving petitioner of the 5th Amendment of the Constitution of the United States.

Availability of U.S.C. 28, Section 2255 for relief herein:

Motion

See:

Stone v. U.S., 358, F.2d 503, (1966), 9th C.A.

Bishop v. U.S., 350 U.S. 961, (1956).

Birdwell v. U.S., 345 F.2d, 877, 9th C.A. (1965).

Nelms v. U.S., 318 F.2d, 150, 153, 4th C.A., (1963).

Gregoria v. U.S., 243 F.2d 18, 5th C.A. (1957).

Johnson v. U.S., 344 F.2d, 150, 401, 405, 5th C.A. (1965).

*U.S. v. Cannom, 310 F.2d 841, 2nd. C.A. (1962).

Statement of Original Conviction

Petitioner was indicted and convicted in this Court on a violation of U.S.C. 26, §174, (Narcotics-Conspiracy), at 1 Count, in U.S. v. Agueci, et al, along with several co-defendants. Trial started on October 27, 1961. Said trial lasted almost three (3) months. Petitioner was found guilty at 1 Count, of having a conversation about narcotics with other co-defendants, and was sentenced to a term of (15) fifteen years imprisonment. See U.S. v. Agueci, 61-Cr. 527. An appeal was taken to the Court of Appeals for this Circuit and judgment was affirmed, and certiorari to the U.S. Supreme Court was denied thereinafter.

Motion

No mental issues being presented at any time subsequent to this date.

Statement of Facts and Law in the Herein Motion

(1) Petitioner alleges that he was mentally incompetent during said trial of which began on October 27, 1961, and that he was unable to assist counsel, and to comprehend said proceeding within a rational degree of understanding, due to mental illness, and or defect, and or (insanity). That he alleges he was deprived of due process of law. See: Bishop v. U.S., 350 U.S. 961 (1956):

> "That the conviction of an accused person while he is legally incompetent violates due process."

See: Pate v. Robinson, 383 U.S. 385, 375, March 7, 1966.

Petitioner states that prior to the time of said trial, and during said trial, and until recent he has been suffering "mental illness," of which led to his present hospitalization at the Medical Center for federal prisoners, here at Springfield, Missouri.

That petitioner has been hospitalized and confined for mental illness for over a period of two and one half years (2 1/2) years. That petitioner's condition worsened to such a degree of continued (psychosis), that he had to be removed from the U.S. Penitentiary at Lewisburg, Pa. to the Medical Center for an indefinite period, after extensive treatment in the psychiatric section at the

prison hospital at Lewisburg.

Petitioner alleges that the testimony of his witnesses, (psychiatrists) will testify as to said mental illness, of which has extended from prior to the date of trial to the present date, and as to the relationship as to incompetency at time of trial, and will prove that the petitioner was incompetent at time of trial, with medical records and expert testimony.

Petitioner alleges that he suffered such a severe psychosis that he had severe delusions and hallucinations and "heard voices" at times prior to trial, and during said trial, and has suffered same until this past year.

Conclusion Herein

Petitioner requests that an evidentiary hearing be ordered by this Court, so as to allow petitioner an opportunity to present his witnesses and evidence to prove that he was indeed incompetent at time of trial, and thus avail this Court to evidence and testimony to justify this Court in ordering said motion for vacating sentence and judgment to be granted. Petitioner will introduce two principal witnesses:

(1) Kenneth H. Ash, M.D.,
U.S. Medical Center
Springfield, Missouri

(Staff psychiatrist)

and

(2) Carl J. Kaufman, M.D.,
Columbia Presbyterian Hosp.
New York, New York

(Staff psychiatrist)

Petitioner has a number of other witnesses to present testimony at said hearing, after consulting counsel.

Petitioner asks that a hearing date be set by this Court as soon as practicable in conformity with past decisions in such hearing, (evidentiary), cases as the herein, so that the testimony and evidence may be presented to the Court, with the petitioner being present therein, an assisting counsel in examination.

See the following cases on hearing as herein:

Brown v. U.S., 267 F.2d, 5th C.A. (1959)
(18 U.S.C.A. §§912, 2314, 28 U.S.C.A. §2

Krupwich v. U.S., 264 F.2d, 213, 8th C.A. (1959)

Collier v. U.S., ___F.2d, ___ 7th C.A. (1968)
No. 16569

Bishop v. U.S., 350 U.S., 961, (1956)

*2nd Cir., see page 2.

Respectfully submitted,
s/ Luigi LoBue
Luigi Lobue
Petitioner

APPENDIX D

Memorandum of Judge Frankel

(Filed October 28, 1969)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Same Title)

FRANKEL, D. J.

It appears from the papers on this motion under 28 U.S.C. §2255 that petitioner was found guilty on December 27, 1961, after a fairly long trial in which he was represented by a well-known criminal lawyer.* About four years later, while serving his sentence of 15 years in prison, petitioner began to be treated for mental illness, and he was transferred to Springfield because of his mental condition in 1966. His claim is that his conviction in late 1961 was a nullity because he was not then competent to assist in his own defense. He asserts that two psychiatrists, whom he names, will be his "principal witnesses" supporting this claim. And he refers to, but does not name, "a number of other witnesses" he contemplates calling "after consulting counsel."

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* Affirmance of the conviction of petitioner and others is reported in United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), cert. denied sub nom. Guippone v. United States, 372 U.S. 959 (1963).

The trial judge was our late Brother Herlands. On October 9, 1969, following the death of Judge Herlands, the pending motion was reassigned to me.

Memorandum

Petitioner repeatedly urges that there is a need for an evidentiary hearing "with the petitioner being present therein" (Motion, p. 6), and it becomes apparent after a while that this matter of his presence in person is a prime objective at the moment. At the same time, however, he asserts that the condition which rendered him incompetent in 1961 has "worsened;" he suggests no concrete purpose to be served by his presence; and he hints at his own prediction that he would not be planning to take the stand himself.

Thus, there is a question whether, assuming the need for an evidentiary hearing, the government should be burdened with the troublesome and risky business of bringing petitioner here for it. See Machibroda v. United States, 368 U.S. 487, 495-96 (1962).

As the papers stand, however, there is a logically prior question about whether an evidentiary hearing is warranted at all. It makes sense, of course, buttressed by controlling precedent, to argue that where a man shows gross mental disorder within a relatively short time after his conviction, a question becomes apparent as to whether he was competent to stand trial. See Bishop v. United States, 350 U.S. 961 (1956), vacating and remanding the case reported below at 223 F.2d 582 (D.C. Cir. 1955). The longer the time lapse, the less vivid becomes the likelihood of incompetence at trial — at least on the basis of the later mental illness standing alone. If

the onset of such illness four years after conviction is all that can be shown, it is unlikely that it could suffice to nullify the verdict and sentence.

As the papers stand, that is the outline of petitioner's case. He names two doctors and refers to other, unnamed "witnesses." But there is no indication of what any of them might be expected to say. Specifically, it is not shown that either of the named psychiatrists or anyone else would be prepared to testify that the petitioner's mental illness beginning in late 1965 or any other facts ground possible inferences that he was incompetent in 1961, when he was tried. The "common sense" district judges are expected to indulge in such cases, Machibroda v. United States, supra, 368 U.S. at 495, would seem to require the presence in the motion papers of something more "detailed and specific" (id.) before the ordering of an evidentiary hearing, with or without the petitioner in attendance. Cf. Nelms v. United States, 318 F.2d 150, 154 (4th Cir. 1963).

As they stand, therefore, the motion papers seem insufficient, and the court might be disposed, in the absence of other considerations, simply to deny the motion. But there are other questions. And there would be in any event some doubt about the propriety of such a denial on what would amount to a kind of pleading deficiency.

First off, noting that petitioner proceeds pro se, but not as an indigent, and speaks of his later

plans in collaboration with counsel, the court is left to wonder whether, and on what terms, petitioner should have the assistance of a lawyer. Secondly, if a lawyer does enter the picture, the court will want to be advised more concretely, and in pertinent detail, of what the petitioner would propose to prove (and through whom) if an evidentiary hearing were ordered. When such questions are answered, there will be a surer basis on which to decide whether there is anything really to be heard.

Accordingly, it is directed that both petitioner and government counsel submit to the court in writing, on or before November 17, 1969, such enlightenment as they can supply on the following questions:

(1) Is petitioner indigent, and, if so, does he desire the assistance of assigned counsel? (If the answers are affirmative, an appropriate affidavit should be made by or for petitioner.)

(2) What, in general, might Dr. Ash and Dr. Kaufman be expected to say on the issues in question? Since at least Dr. Ash appears to be (or to have been) in the government's employ, government counsel are invited to supply whatever they can in the way of an objective report on this subject.

(3) Would petitioner propose to testify or otherwise participate if an evidentiary hearing were ordered? If the answer is "yes," specifics should be given.

Memorandum

The court is aware that affirmative answers under question "(1)" may entail as a practical matter the postponement of definitive responses to the later ones. It seems appropriate, however, in an effort to expedite the matter, to sketch the course of proposed inquiry for the guidance of all concerned

Dated: New York, New York
October 28, 1969

s/ Marvin E. Frankel
U.S.D.J.

APPENDIX E

Letter to Frankel, J.

Luigi LoBue Reg No. 16236-H
Post Office Box 4000
Springfield Missouri 65802

December 8, 1969

Hon. Judge Marvin E. Frankel
United State District Court
United State Court House
New York N.Y. 10007

Honorable Judge Frankel

Dear Sir.

In regards to your Letter of December 1, 1969. Concerning the NY application under 28 U.S.C. S. 2255.

Your Honorable Sir. at this time I wish to inform the Honorable Court of District of N.Y. United State District Court. That I wish to at this time withdraw my motion.

Sir, at this time I don't have anything to add to what I already have sumitted to the Hornable Court. So your Honor I would like to have the Court except this lette as a Plea to discontinue.

Letter to Frankel, J.

Thanking The Hororable Court and the Hon. Judge Marvin E. Frankel for The Considerations.

Respectively

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s/ Luigi LoBue
16236

APPENDIX F

Endorsed Order
(Filed December 10, 1969)

Re: Lo Bue v. U.S. 68 Civ. 3839

Endorsement

Following the study reflected in this court's memorandum of October 28, 1969, and a further inquiry of December 1, 1969, the petitioner, by letter dated December 8, 1969, states that he wishes to withdraw his application. All things considered, it is concluded that he should be permitted to do so. Accordingly, upon the petitioner's application, his petition is dismissed.

So ordered.

Dated: New York, New York
December 10, 1969

APPENDIX G

Petition
(Filed February 9, 1972)

(Same Title)

The petition of LUIGI LOBUE, respectfully alleges:

1. I was one of the defendants in a criminal proceeding commenced in this Court by Indictment (No. 527 Crim. 1961). Such indictment, filed on May 22, 1961, charged me with the single crime of Conspiracy (21 U.S.C., §173). My various co-defendants (nine in number) were also charged with the crime of Conspiracy as well as related substantive crimes, in violation of 21 U.S.C. §173, 174.

2. A jury trial was conducted before Hon. WILLIAM B. HERLANDS, U.S.D.J., upon the aforesaid indictment and such trial culminated in my conviction, on December 27, 1961. I was sentenced by judge HERLANDS to a term of 15 years imprisonment on February 13, 1962.

3. The Court of Appeals for the Second Circuit affirmed my conviction on November 8, 1962 (310 F.2d 817). My petition for a Writ of Certiorari to the Court of Appeals was denied on April 1, 1963 (372 U.S. 959, 83 Supreme Court 1016, 10 L. Ed. 2d 12).

4. I was in Federal custody upon other charges during the trial aforesaid and the 15 year sentence imposed upon me by Judge HERLANDS was made

to run concurrently with the Federal sentence which I was then serving. In this connection, I was subsequently incarcerated at Federal facilities located in Lewisburg, Pennsylvania, and Springfield, Missouri. My confinement at the latter facility was necessitated by my need for psychiatric treatment.

5. In July, 1970, I was released from the federal prison hospital at Springfield, Missouri. I am presently in Federal parole status which does not expire until April, 1977.

6. I make this petition pursuant to 28 U.S. Code, §2255 in support of my application to vacate and set aside the judgment of conviction entered against me in this Court on February 13, 1962 by reason of my mental incompetence or insanity at all times relating to the commission of the crime charged against me under Indictment No. 527 Crim. 1961, as well as prior to, during, and after the trial relating thereto.

7. Prior to and during my trial, I had virtually no communication with my counsel by reason of both language difficulties and the fact that I did not comprehend at all times, that I was a defendant in a criminal trial. My trial lasted approximately 6 to 7 weeks and during much of this time I did not understand that I was in a courtroom. My impression oft-times was that I was in a church in Greece and that the Court's lectern and bench contained a dead horse. My recurrent impression was that I was attending a funeral for this dead animal.

8. The genesis for this thinking on my part seems to have derived from a horrible experience which I had undergone in World War II while serving in Greece as a member of Italian expeditionary forces which had invaded that country. I had served in the cavalry, and during an air raid I received an almost direct hit which killed my mount and buried the two of us. During my trial, I thought that Judge HERLANDS was a Greek priest who had, in my mind, been pursuing me since the war, repeating to me that it was my fault that the horse had been killed.

9. I also recall that during my trial, I mentioned the abobe to one of my co-defendants who told me that we were not in a church, but that we were in a Court. Indeed, on certain days it did appear to me that I was in Court, but recurrently the priest-dead horse hallucination kept intruding so that there were long stretches of time during which I had absolutely no idea of what was taking place in the courtroom.

10. The priest-dead horse hallucination was not something that was new to me. The very same theme and apparition had repeatedly come to me during the years that I was a German prisoner of war (1943-1945), and during the years after the war.

11. During the course of my federal imprisonment, as indicated above, I was transferred to the Federal Medical Center at Springfield, Missouri where I received extensive medical and psychiatric treatment. A voluminous file was developed in

my case which establishes the fact that I have had a pre-existing mental condition.

12. While in treatment at Springfield for my mental condition, I was given primarily the following drugs: Thorazine, Stelazine, Tofanil, and Elavil.

13. I am advised that Thorazine is generally prescribed to reduce apprehension and tension; Tofanil to treat endogenic depression; Stelazine to treat neurosis and anxiety; and Elavil to alleviate severe mental depression and symptoms of depressive syndromes.

14. Exhibit "A" attached hereto, which is a portion of my medical record, shows that my original diagnosis when admitted to Springfield was, "schizophrenic reaction, paranoid type."

15. Exhibit "B" attached hereto, is one of the final reports upon my discharge and it states, "He has a history of several psychotic episodes, assaultiveness, persecutory delusions and some homosexual idealizations. . . . Final diagnosis is schizophrenic reaction, paranoid type."

16. As an indication of my paranoid personality, the examining doctor reported on August 9, 1966 in his medical report, a copy which is attached hereto as exhibit "C", that I was concerned about "how people were talking behind his back that he's a bad man."

17. The report of the doctor dated August 26, 1968, a copy of which is attached hereto as

exhibit "D", states that I was suffering from delusions.

18. The report of October 13, 1968, attached as exhibit "E", shows that I heard voices from a priest.

19. The Special Progress Report of July 20, 1966 attached as exhibit "F" states, "He has a history of several psychotic episodes at Lewisburg manifesting assaultiveness, persecutory delusions, some homosexual ideations, auditory hallucinations that his mother was coming to him and calling him. He was also preoccupied with suicidal ideation and repeatedly asked for poison so that he could end his life. After being returned to population at Lewisburg, he had to be readmitted to the hospital because of a relapse of paranoid symptoms with anxiety and depression."

20. In the prison's Annual Review, dated May 31, 1967, there is much discussion of my mental status while in prison. It shows that I was a person suffering from schizophrenic reaction, paranoid type and at times exhibited psychotic breaks. A copy of this review is attached as exhibit "G".

21. The Annual Review of my stay at prison, dated January 3, 1968, stated that I suffer from a severe paranoidal delusional system, a copy of this report is attached as exhibit "H".

22. The Annual Review of my stay at prison,

dated April 24, 1968, repeated that I suffered from paranoia. A copy of this report is attached hereto as exhibit "I".

23. In a special progress report dated July 2, 1968, it was stated that it was very difficult to distinguish what I say due to paranoidal delusions. A copy of this report is attached hereto as exhibit "J".

24. My original admission to Springfield was for psychiatric service. Specifically, I was to be treated for schizophrenic reaction. A copy of my referral form is attached as exhibit "K".

25. The medical record involving my transfer to Springfield states that the major diagnosis to be schizophrenic reaction; paranoid type in remission. This report is attached hereto as exhibit "L".

26. I was placed in the hospital at Lewisburg for 56 days in 1965, and the doctors determined I was suffering from a schizophrenic reaction, paranoid type in remission. A copy of this report is attached hereto as exhibit "M".

27. I was again hospitalized at Lewisburg for 31 days in 1965 and 1966, and again I was diagnosed as a paranoid personality. A copy of the cover sheet stating these facts is attached as exhibit "N". The narrative summary again stated that I was paranoid. A more full discussion can be viewed from the copy attached hereto as

exhibit "O". Manifestly, my condition at Lewisburg deteriorated to such an extent that transfer to Springfield could not longer be reasonably deferred.

28. While at Springfield, I recall now that I also imagined that my "priest" assaulted me and I struck back at him severely injuring my own arm which I had struck against some stationary object.

29. I also requested doctors at Springfield to allow me to telephone my father — who was dead. I was convinced that I could reach my father, and I explained to the doctor that I had sufficient money to put this call through. Permission to get in touch with my father's spirit in this fashion was denied (see Exh. "P").

30. As indicated above, I have suffered from serious mental illness. This illness existed prior to, during, and after my trial before Judge HERLANDS. I was not mentally competent to participate in my defense.

31. Accordingly, the judgment of conviction entered against me in 1962 should be vacated and set aside.

WHEREFORE, I pray that an order be made and entered herein granting a hearing and, that after such hearing, the judgment of conviction

and the sentence heretofore entered be vacated and set aside.

s/_____
LUIGI LOBUE

Sworn to before me the
8 day of Feb. 1972.

(EXHIBITS ARE OMITTED FROM THIS PETITION)

APPENDIX H
Title 28 U. S. C. § 2255

"§2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prison-

er or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1175

LUIGI LOBUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erroneously denied his fourth motion for relief under 28 U.S.C. 2255.

After a jury trial on December 27, 1961, in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to violate the narcotics laws, in violation of former 21 U.S.C. 174. He was sentenced to a fifteen year term of imprisonment to run concurrently with a three year term imposed on February 29, 1960, after his plea of guilty to a charge of harboring aliens illegally within the United States, in violation of 8 U.S.C. 1324 and 18 U.S.C. 371. The court of appeals affirmed, *sub nom. United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, *sub nom. Guippone* v. *United States*, 372 U.S. 959. Petitioner, who is currently subject to

deportation proceedings by the Immigration and Naturalization Service, was released on parole on May 28, 1970. Petitioner now seeks review of the court of appeals' affirmance (Pet. App. 1a-2a) of the district court's denial (Pet. App. 3a-8a) of petitioner's fourth collateral attack upon his narcotics conviction.

Petitioner's first 2255 motion alleged the denial of a fair trial because the trial court failed to read a portion of the testimony of a witness to the jurors during their deliberation. It was denied by Judge Weinfeld on September 27, 1967.

In his second collateral motion, filed on September 26, 1968, petitioner alleged that he was mentally incompetent prior to, during and after trial (Pet. App. 9a-13a). In a memorandum filed October 28, 1969, (Pet. App. 14a-18a), Judge Frankel stated that the motion papers seemed insufficient because there was "no indication * * * that either of the named psychiatrists or anyone else would be prepared to testify that the petitioner's mental illness beginning in late 1965 or any other facts ground possible inferences that he was incompetent in 1961, when he was tried" (Pet. App. 16a). Rather than denying the motion on this pleading deficiency at that time, Judge Frankel directed both petitioner and the government to submit in writing further detailed information as to whether petitioner desired counsel, what the expected testimony of the two named psychiatrists might be, and whether petitioner planned to testify if an evidentiary hearing were held (Pet. App. 16a-18a).

On November 28, 1969, the government, by supplementary affidavit, informed the trial court that medical records at the United States Medical Center in Springfield, Missouri, where petitioner was transferred on

May 25, 1966, stated that petitioner was diagnosed at that time as showing a schizophrenic reaction, paranoid type, suffering from psychotic episodes, delusions and occasional hallucinations. The affidavit also stated that the records revealed that after an initial six week period of erratic conduct, petitioner's behavior was considered unremarkable and that there was no indication in the records that petitioner was suffering from mental illness at any time prior to November 1965.

On December 1, 1969, Judge Frankel, having heard nothing from petitioner, wrote and directed him to " 'send a response or an explanation of why none is possible' " (Pet. App. 6a). Petitioner replied on December 8, 1969, stating that he did not "have anything to add to what I already have submitted to the Honorable Court," and asked Judge Frankel to withdraw his application (Pet. App. 19a-20a). On December 10, 1969, Judge Frankel, with an awareness of petitioner's medical history, filed an endorsement stating: "All things considered, it is concluded that [petitioner] should be permitted to [withdraw his petition]. Accordingly, upon the petitioner's application, his petition is dismissed" (Pet. App. 21a).

On June 8, 1970, petitioner with the aid of retained counsel filed the third collateral motion. His sole contention was that one of the government's witnesses had given perjured testimony during the 1961 trial. Although petitioner voluntarily completed a "Persons in Federal Custody Form" at that time which expressly informed him that all grounds for relief were to be stated thereon, he did not allege any issue of mental incompetence. On October 6, 1970, Judge Weinfeld filed an endorsement dismissing this petition as "utterly without merit" (Pet. App. 6a).

On February 9, 1972, petitioner with the aid of retained counsel filed the present motion (Pet. App. 22a-29a) alleging the identical grounds presented in his second motion, *i.e.*, that he was mentally incompetent prior to, during, and after trial. Petitioner's counsel supplemented this motion with records of the psychiatric treatment petitioner received during his commitment. As was the case with respect to petitioner's 1969 motion, no witness or evidence was offered to show that the petitioner was incompetent in 1961.[1]

In his decision filed March 20, 1972 (Pet. App. 3a-8a), Judge Wyatt recited the history of petitioner's collateral attacks upon his narcotics conviction including the failure of petitioner's retained counsel to raise this claim of mental incompetence in his third motion. He explained that this motion was assigned to him "apparently because the motion papers failed to disclose 'whether or not applications previously have been

[1]Petitioner's medical records, submitted as exhibits A-P, state that "he was first admitted to the psychiatric ward [at Lewisburg Prison] on November 18, 1965 manifesting depression and paranoid ideation. Just prior to this psychotic break, he had been examined and found to have duodenal ulcers and this may have precipitated his homosexual ideation * * *" (Ex. G, p. 1). After a brief recovery (Ex. O), petitioner experienced three overt psychotic breaks and his condition deteriorated (Ex. G, p. 1; Ex. M; Ex. N). He was therefore transferred to the Federal Medical Center at Springfield, Missouri, on May 25, 1966, where he remained until his parole in May 1970 (Ex. G, p. 2; Ex. K). His diagnosis at both the time of his admission and in May 1970 was "schizophrenic reaction, paranoid type, improved" (Ex. G, p. 3; Ex. B). The reports note that petitioner was maintained on minimal doses of medication and had adjusted well except "that Labue was quite paranoid and that in fact this paranoid behavior was part of a delusional system including a fear that people would know that he was a homosexual * * *" (Ex. H; Ex. I). We are lodging a copy of the exhibits with the Clerk of this Court.

made for writs or for similar relief, stating to what court or judge they were made, the determination in each case, and any new facts upon the present application that were not previously shown' in violation of the requirements of General Rule 26 (a) of this Court" (Pet. App. 7a). He also stated that this motion is the same as that decided by Judge Frankel in 1969, and that the substance of the information concerning petitioner's psychiatric treatment was provided in 1969 by the government's supplemental affidavit (Pet. App. 7a). Judge Wyatt then concluded, as did Judge Frankel in his memorandum of October 28, 1969, that petitioner is entitled to no relief because his application contains only bald legal conclusions with no supporting factual allegations. Judge Wyatt stated (Pet. App. 8a) that "* * * a review of the extensive files of the probation office and of the papers in this case and in the case before Judge Frankel discloses no suggestion that [petitioner] was incompetent in 1961 when he was tried. This motion is dismissed because it is the 'second or successive motion' for relief similar to that considered previously by this Court in 68 Civ. 3839 (28 U.S.C. 2255)."

Petitioner contends that Judge Wyatt's denial of the latest motion without a hearing was improper.

The record shows that neither the petitioner's second nor present motion presents any concrete evidence to support his claim of mental incompetence. Contrary to petitioner's claim (Pet. 16), even petitioner's medical records do not suggest that he hallucinated at his trial nor do they refer to any history of mental problems prior to November 1965.

While it may be that the merits of petitioner's assertion of mental incompetency were not reached by

Judge Frankel on the earlier motion, this would not mean that under *Sanders* v. *United States*, 373 U.S. 1, petitioner was automatically entitled to an evidentiary hearing on any subsequent unsubstantiated petition. Rather, as this Court noted in *Sanders, supra*, 373 U.S. at 19, a trial judge may repeatedly conclude that a motion is deficient where only bald legal conclusions without factual support have been alleged. After an examination of the application, files, and records of this case, Judge Wyatt properly found that petitioner's fourth collateral motion was insufficient as a matter of form—much as Judge Frankel had found petitioner's second motion. Only if petitioner were able to provide some shred of evidence, other than his bald assertion, that he was in fact mentally incompetent prior to or during his trial in 1961, would he be entitled to a hearing. Compare *Fontaine* v. *United States*, No. 71-6757, decided April 2, 1973.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. Griswold,
Solicitor General.

APRIL 1973.

DOJ 1973